



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

April 23, 1993

Mr. Leonard W. Peck, Jr.  
Assistant General Counsel  
Legal Affairs Division  
Texas Department of Criminal Justice  
P.O. Box 99  
Huntsville, Texas 77342-0099

OR93-205

Dear Mr. Peck:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 18620.

The Texas Department of Criminal Justice ("TDCJ") received a request for information for several different categories of information. Specifically the request includes:

1. The undersigned's TDCJ-ID Coffield Unit Records:
  - a. Classification,
  - b. Warden's File(s),
  - c. Travel Card,
  - d. Hall Card or equivalent,
  - e. Other non-medical records.
2. The same above types of records at the below prior TDCJ-ID Units:
  - a. Ramsey 1 from December 1987 to May 1992,
  - b. Ramsey III from September to December 1987,
  - c. Ramsey II from May 1986 to September 1987,
  - d. Darrington from April 1984 - May 1986.
3. TDCJ-ID Bureau of Classification Records maintained on the undersigned.

4. TDCJ-ID Form I-186 dated April 28 or 29, 1992, signed by Ramsey I Warden Herbert Scott to search the undersigned's legal materials for alleged written contraband.
  - a. Return/results of the above search.
5. TDCJ-ID Inter-Unit Transfer Policies, Rules and Regulations.
6. TDCJ-ID State Classification Committee's documents associated with the undersigned's May 1992 transfer from Ramsey I to Coffield.
  - a. Names and titles of persons approving the above transfer.
  - b. So-called reasons and purposes therefore.
  - c. Names and titles of person initiating the said transfer.
7. TDCJ-ID Internal Affairs' investigation as to the item 4. matter.
8. TDCJ-ID Education Policies, Rules, and Regulations pertaining to the University of Houston-Clear Lake's Masters Degree Program.
- [no item 9]
10. All Orders, Injunctions, TRO's issued by the U.S. District, Southern District of Texas, in reference to the *Lamar v. Coffield* Consent Decree (for the period of 1990 to the present).
  - a. All other Orders, whether state or federal, related to the above from 1991 to the present.
11. Copies of a press release, or whatever form, by Leonard Peck in June 1991 referring to the forced cell integration by TDCJ-ID.
12. Racial Breakdowns for the Coffield Unit from September 22, 1992 to the present.
13. Reason the requestor is being deprived from being transferred back to Ramsey I for attendance in the UH-CL Masters program.

You have agreed to provide copies of the documents requested in categories 1 through 4, and category 12, and withhold information protected from disclosure by section 3(a)(1), specifically the informer's privilege. The informer's privilege authorizes a governmental body to withhold information which would reveal the identity of persons

who report possible violations of law to officials charged with enforcement of that law. Open Records Decision No. 462 (1987). You may provide edited copies of the documents if giving access to the requestor would also give access to the confidential information. Open Records Decision No. 457 (1987). Accordingly, you may withhold only information in categories 1 through 4 and 12 that would tend to identify a confidential informant.

With respect to category 5, you state that there are no written inter-unit transfer policies, rules and regulations. A governmental body is not required to make available information which does not exist. Open Records Decision No. 362 (1983). However, you state that the Classification Plan, which contains information pertaining to inter-unit transfers, will be made available to the requestor.

You claim that documents requested in category 6 are excepted from required public disclosure by section 3(a)(8) as information, which if released, would compromise the safety and security of unit operations within the prison. When section 3(a)(8) is claimed, we must determine whether release would undermine a legitimate interest of law enforcement and a case-by-case approach is necessary. Open Records Decision No. 434 (1986). We agree that safety and security of unit operations is a legitimate interest of the prison. After reviewing the documents submitted for our review, we agree that release of the information would undermine that interest. You may therefore withhold the documents requested in category 6.

You contend that information requested in category 7 is excepted from required public disclosure by sections 3(a)(3) or 3(a)(7) because the information is related to "ongoing aspects of the *Ruiz* litigation." Section 3(a)(3) excepts information relating to pending or anticipated litigation. Open Records Decision No. 551 (1990); *see also* Open Records Decision No. 429 (1985) (attorney work product is included within section 3(a)(3) exception for information related to litigation.) When litigation is concluded, section 3(a)(3) is no longer applicable. The final judgment in *Ruiz v. Estelle*, 503 F.Supp. 1265 (S.D. Tex. 1980), *aff'd in part and vacated in part*, 679 F.2d 1115 (5th Cir.), *amended in part*, 688 F.2d 266 (5th Cir.), *cert. denied*, 460 U.S. 1042 (1982), was signed by Judge Justice December 11, 1992. Because the *Ruiz* litigation has concluded and there is no evidence that new litigation is anticipated, the information in category 7 is not excepted by section 3(a)(3).

Section 3(a)(7) excepts from disclosure communications within the attorney-client privilege. Open Records Decision No. 574 (1990). The exception encompasses factual information and requests for legal advice communicated from the client to the attorney, and the attorney's legal advice or opinion to the client. *Id.* at 7. However, factual communications from attorney to client are not protected. *Id.* You state that you have not yet communicated to your attorney the information in category 7. In addition, the letters from your attorney convey factual information and do not contain legal advice or opinion. Therefore, the documents in category 7 are not excepted from disclosure by section 3(a)(7).

You also claim that the information in category 7 constitutes "inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency" under section 3(a)(11) of the act and, therefore, is excepted from public disclosure.

For several months now, the effect of the section 3(a)(11) exception has been the focus of litigation. In *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), the Third Court of Appeals recently held that section 3(a)(11) "exempts those documents, and only those documents, normally privileged in the civil discovery context." *Gilbreath* at 413. The court has since denied a motion for rehearing this case.

We are currently reviewing the status of the section 3(a)(11) exception in light of the *Gilbreath* decision. In the meantime, we are returning your request to you and asking that you once again review the information and your initial decision to seek closure of this information. We remind you that it is within the discretion of governmental bodies to release information that may be covered by section 3(a)(11). If, as a result of your review, you still desire to seek closure of the information, you must re-submit your request and the documents at issue, along with your arguments for withholding the information pursuant to section 3(a)(11) or any other exception that you have previously raised. You must submit these materials within 15 days of the date of this letter. This office will then review your request in accordance with the *Gilbreath* decision. If you do not timely resubmit the request, we will presume that you have released this information.

With respect to information requested in category 11, you state that there is no press release referring to the forced cell integration. You also state that you do not have the information requested in category 13. The Open Records Act only applies only to information in existence; it does not require a governmental body to prepare new information. Open Records Decision No. 572 (1990). You therefore need not prepare new information to respond to categories 11 and 13. You do not mention categories 8 and 10. Accordingly, this information is not excepted from disclosure pursuant to the Open Records Act. Open Records Decision No. 325 (1982).

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR93-205.

Yours very truly,



Loretta R. DeHay  
Assistant Attorney General  
Opinion Committee

LRD/SG/le

Ref.: ID# 18620

cc: Mr. Lynn M. Creel  
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(w/o enclosures)